229369

HARKINS CUNNINGHAM LLP

Attorneys at Law

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804

Telephone 202.973.7600
Facsimile 202.973.7610

Paul A. Cunningham
202.973.7600
pac@harkinscunningham.com

April 21, 2011

BY E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Manufacturers Railway Company – Discontinuance Exemption – In St. Louis, MO., Docket No. AB-1075X

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find Manufacturers Railway Company's Reply To The Brotherhood Of Maintenance Of Way Employees Division – International Brotherhood Of Teamsters' Opposition To Petition For Exemption.

Very truly yours,

Paul A. Cunningham
Counsel for Manufacturers Railway Company

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1075X

MANUFACTURERS RAILWAY COMPANY
– DISCONTINUANCE EXEMPTION –
IN ST. LOUIS, MO

MANUFACTURERS RAILWAY COMPANY'S REPLY TO THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION – INTERNATIONAL BROTHERHOOD OF TEAMSTERS' OPPOSITION TO PETITION FOR EXEMPTION

Paul A. Cunningham
Matthew W. Ludwig
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, DC 20006-3804
(202) 973-7600

Counsel for Manufacturers Railway Company

April 21, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1075X

MANUFACTURERS RAILWAY COMPANY
– DISCONTINUANCE EXEMPTION –
IN ST. LOUIS, MO

MANUFACTURERS RAILWAY COMPANY'S REPLY TO THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION – INTERNATIONAL BROTHERHOOD OF TEAMSTERS' OPPOSITION TO PETITION FOR EXEMPTION

Pursuant to 49 C.F.R. § 1104.13(a), Manufacturers Railway Company ("MRS") hereby replies to the Brotherhood of Maintenance of Way Employees Division – International Brotherhood of Teamsters' ("BMWED") opposition to MRS's petition for exemption ("BMWED Opp.").[1] For the reasons set forth below, the arguments raised by BMWED do not support the relief requested, and MRS therefore respectfully requests that exemption petition be granted without any labor protective conditions. The factual assertions contained in this reply are verified by Thomas Preis, Director of Transportation Procurement for Anheuser-Busch, Inc. and Kurt Andrew, President and CEO of MRS.

BMWED's sole basis for opposing MRS's exemption petition is its opposition to the STB's settled practice of not imposing labor protective conditions on entire system abandonments or discontinuances. BMWED makes the following three arguments in support of

---

[1] Two other parties – the United Transportation Union and the International Association of Machinists and Aerospace Workers – have filed opposition statements that do not contain any substantive arguments. For the reasons discussed herein, those opposition statements should likewise be denied.

its contention that the STB should abandon that settled practice and impose the labor protective conditions found in *Oregon Short Line – Abandonment – Goshen*, 360 I.C.C. 91 (1979):

1) Congress removed the Board's discretion to deny employee protective conditions in whole line abandonments when it passed the Interstate Commerce Commission Termination Act of 1995 (ICCTA);

2) even if the Board retains jurisdiction to deny employee protective conditions in whole line abandonments, the record in this proceeding does not support an evidentiary finding that MRS will cease rail operations; and

3) even if this proceeding involves a whole line abandonment or discontinuance of service, MRS has failed to demonstrate its need for the Board to exercise discretion and relieve it of its employee protective obligations.

BMWED Opp. at 4. Those arguments are without merit. First, BMWED's statutory interpretation argument is implausible, and ignores over a decade of contrary STB precedent; second, MRS will cease all rail operations when it discontinues common carrier service; and third, BMWED is wrong about STB precedent regarding labor protective conditions in entire system abandonments and discontinuances and it has not met its burden to show that labor protection is warranted under that precedent. Accordingly, MRS respectfully requests that the Board follow its settled precedent and grant the exemption petition without imposing labor protective conditions.

1. ICCTA Did Not Change The ICC's "Well Established" Precedent That Labor Protective Conditions Are Not Imposed In Whole System Abandonments

BMWED's primary argument – that passage of ICCTA changed the Board's authority regarding labor protective conditions on entire system abandonments – is wrong. BMWED does not dispute that, prior to ICCTA, the ICC not only had the authority to decline to impose labor protective conditions on entire system abandonments, but that it was its consistent, well-settled practice to do so. And BMWED cites no statutory text, no legislative history, no STB decisions,

and no court decisions indicating that Congress, the Board, or the federal courts understood ICCTA to represent a departure from past practice.

Nor could BMWED do so. ICCTA simply did not substantively change the statutory text at issue. Prior to ICCTA, the relevant language of 49 U.S.C. § 10903 read: "Each certificate [authorizing abandonment or discontinuance] shall also contain provisions to protect the interests of employees." As part of a recodification of § 10903, that language was amended by ICCTA to read as follows: "The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees."

BMWED argues that ICCTA's substitution of the word "any" for the word "each" in the prior codification somehow changed its meaning. But the implicit distinction suggested by BMWED between "each" and "any" is unfathomable.[2] As the ICC had previously noted, the use of the word "each" in the earlier version of the statute "would appear to require imposition of employee protective conditions in *all* permitted abandonments." *Wellsville, Addison & Galeton R.R. – Abandonment of Entire Line in Potter and Tioga Counties, Pa.*, 354 I.C.C. 744, 745 (1978). The pre-ICCTA language was added in 1976 by the 4R Act, and the ICC determined that the legislative history and prior ICC precedent indicated that the addition of this language was not intended to change the policy and practice of the ICC in connection with certificates involving total termination of service by a railroad company. *Id.* at 745-46.

Neither the statutory text nor the legislative history cited by BMWED support its contention that ICCTA fundamentally altered this settled understanding. BMWED's only argument is that (1) because the House Report stated that no changes were intended to the labor protective requirements, (2) and that the House version was not adopted, then (3) Congress must

[2] The first synonym listed for "each" in Merriam-Webster's online thesaurus (www.merriam-webster.com/thesaurs) is "any."

have intended the changes that BMWED support. *See* BMWED Opp. at 7. This reasoning, however, is contrary to the principle that "Congress is presumed to enact legislation with knowledge of the law . . . [and] that absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 337 (4th Cir. 2005) (quotation omitted); *see also United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002) "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates." (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

In making its argument, BMWED also ignores the over 30 cases in which the Board has declined to impose labor protective conditions on entire system abandonments since the passage of ICCTA.[3] BMWED does not even attempt to distinguish these cases or argue that the Board has been consistently and repeatedly incorrectly interpreting ICCTA since the day it was passed. Nor does BMWED cite any STB or court authority that would suggest that ICCTA altered the ICC's settled practice regarding labor protective conditions in entire system abandonments or discontinuances.

In short, BMWED provides no support for its argument that ICCTA fundamentally changed the way labor protective conditions are handled in entire system abandonments. The STB retains the authority to decline to impose such conditions, and should follow its settled practice of doing so only when certain circumstances (discussed in more detail below) are present. Because those circumstances are not present here, no labor protective conditions should be imposed on this transaction.

---

[3] *See, e.g., K & E Ry. – Abandonment Exemption – In Alfalfa, Garfield, and Grant Counties, OK, and Barber County, KS*, STB Docket No. AB-480X (STB served Dec. 31, 1996); *W. Ky. Ry. – Abandonment Exemption – in Webster, Union, Caldwell and Crittenden Counties, KY*, STB Docket No. AB 449 (Sub-No. 3X) (STB served Jan. 20, 2011).

2. BMWED Is Incorrect That MRS Would Not Completely Discontinue Rail Service Over Its Entire System

BMWED's speculative argument that MRS will continue railroad operations once it has received and consummated discontinuance authority is incorrect. Should MRS discontinue service, it will neither become a private carrier[4] nor continue any railroad operations. BMWED also suggests that the miscellaneous services MRS provides to other carriers (such as locomotive repair) would justify the imposition of labor protective conditions in this proceeding. BMWED, however, does not explain why this would be the case. In any event, MRS has no plans to continue those services if it discontinues common carrier service; and, even if it did, the law would not support BMWED's position. *See Wellsville, Addison & Galeton R.R. – Abandonment of Entire Line Potter & Tioga counties, PA*, 354 I.C.C. 744, 746 (1978) (a carrier's "small and deficit producing boxcar leasing operations . . . are inadequate to justify imposition of employee protective conditions").

BMWED asserts that continued MRS operations will be necessary to handle the 6 to 7 inbound rail cars that the brewery receives. However, as discussed in more detail below, the brewery intends to contract with an unrelated noncarrier switching service provider to handle that traffic. The switching provider will be neither owned nor controlled by the brewery or any entity related to MRS, Anheuser-Busch Incorporated, or Anheuser-Busch Companies, Inc.

---

[4] However, even if this were the case, under existing STB precedent no labor protective conditions would be imposed. *See Almono LP—Abandonment Exemption—In Allegheny County, PA*, STB Docket No. AB-842X (STB served Jan. 12, 2003) (no labor protection where carrier abandoned line constituting its entire system, then operated that line as a private spur line).

3. BMWED Has Not Demonstrated That Any Exception To The Board's Settled Practice Regarding Labor Protective Conditions In Entire System Abandonments Is Applicable Here And None Exists

The ICC and the Board have consistently held that no labor protective conditions will be imposed when abandonment or discontinuance authority is granted for a railroad line that constitutes the carrier's entire system. This is because:

> After the entire line of a railroad is abandoned, no operating carrier remains to enjoy the benefits of the abandonment or pay the costs of employee protection. The Commission has generally refused to impose employee protective conditions which would, in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease. The conditions . . . developed in *Oregon Short Line*[] are not appropriate for an entire line abandonment where the abandoning railroad has no rail carrier affiliate which continue operations similar to its own. For example, normally, employees who are displaced or dismissed because of an abandonment are required to exercise seniority rights where possible to obtain another position. This being impossible where all rail service ceases, the parent would be forced to provide the full 6 years dismissal allowance with no hope of reducing this burden by using the employee's services elsewhere.

Northampton & Bath R.R. – Abandonment Near Northampton & Bath Junction in Northampton County, PA, 354 I.C.C. 784, 785-86 (1978). However, the *Northampton* decision noted that the ICC has "recognized exceptions to the policy of not imposing employee protective conditions on entire system abandonments where there is a corporate parent who will benefit from the abandonment and who can be made responsible for its costs." *Id.* at 786. The ICC then identified two scenarios where that might occur:

1. "when the parent is a rail carrier who intends to assume all or some of the subsidiary's operations but be relieved of its deficit operations," and

2. "whether or not [the parent] is a carrier, if the financial benefits from disposition of the properties far exceed the sum of the parent's net investment in the subsidiary, and the aggregate of the operation deficits incurred by the subsidiary in the years following the parent's acquisition of the subsidiary stock."

Id. at 786. As in the *Northampton* proceeding, neither exception is present here. And, contrary to the argument of BMWED that the burden is on MRS to prove the Board should grant the petition without imposing labor protective conditions, "it is well settled that employee protective conditions *will not be imposed* unless the evidence shows" the existence one of those two exceptions. *Sierra Pacific Indus. – Abandonment Exemption – in Amador County, CA*, STB Docket No. AB-512X, slip op. at 8 (STB served Feb. 25, 2005) (emphasis added).

First, the corporate parent of MRS is Anheuser-Busch Companies, Inc., a non-carrier, which also owns Anheuser-Busch, Incorporated, the only active shipper on the line. Neither Anheuser-Busch Companies, Inc. nor Anheuser-Busch, Incorporated intends to "assume all or some of [MRS's] operations" or to otherwise conduct substantially similar rail operations once MRS is granted discontinuance authority. To the extent that Anheuser-Busch, Incorporated, the remaining shipper on the line, requires continuing rail service for inbound shipments of grain, it intends to contract with an unrelated noncarrier third party to provide switching service to provide access to the Terminal Railroad Association or the Union Pacific Railroad Company.[5] However, neither Anheuser-Busch Companies, Inc. nor Anheuser-Busch Incorporated will be conducting these rail operations;[6] instead Anheuser-Busch Incorporated would merely receive service from an unrelated provider of switching service.

This is similar to the situation presented in *Northampton*, where the ICC found no labor protective conditions should be imposed. In *Northampton*, the ICC overruled the review board's conclusion that US Steel, the "noncarrier parent would benefit as it would continue to receive

---

[5] This is also the reason why there will be no diversions to truck caused by the proposed discontinuance.

[6] As noted above, the switching provider will be neither owned nor controlled by any entity related to MRS, Anheuser-Busch Incorporated, or Anheuser-Busch Companies, Inc.

service from Conrail as a shipper without having to bear the cost of the of [the abandoning carrier's] losses." *Id.* at 786. The ICC first distinguished the cases the review board relied on, as they involved situations where the ultimate corporate parent was itself a carrier, and intended to continue operating portions of the abandoning carrier's lines. *Id.* at 786-87. The ICC then held that the "possibility that [US Steel] as a shipper may obtain service from a nonrelated carrier such as Conrail is not relevant" to the analysis under the first exception. *Id.* at 787. Likewise, the fact that Anheuser-Busch, Incorporated (which is not even the corporate parent of MRS) intends "as a shipper [to] obtain service from a nonrelated" entity "is not relevant" to whether the first *Northampton* exception applies.

Nor is the second *Northampton* exception applicable here. The noncarrier parent of MRS will not receive any benefit that is over and above the relief from the burden of deficit operations of MRS. This exception is based on the factual scenario posed by *Washington & Old Dominion R.R. Abandonment of Entire Line in Virginia*, 331 I.C.C. 587, 602 (1968), *affirmed* 287 F. Supp. 528 (E.D. Va. 1968)). In that case, the parent had "a firm commitment for the purchase of the line at a price substantially higher than salvage value." 331 ICC at 600. The ICC therefore found that without labor protective conditions, that benefit, which was above and beyond the relief from the deficit operations "would be, to a certain extent, at the detriment of the employees, and, on the facts of this case, we believe such detriment can and should be alleviated." *Id.* at 602.

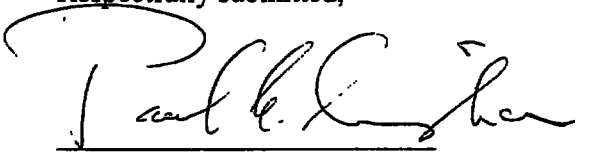
Here, neither MRS nor its noncarrier parent has (or is even seeking) an offer for the purchase the line (let alone a "firm commitment . . . at a price substantially higher than salvage value") and neither party will benefit beyond the extent that they will be relieved of the burden of MRS's deficit operations, which was approximately $700,000 in 2010, and is expected to be

$1.4 million in 2011, and $2.0 million annually thereafter. Therefore, the second *Northampton* exception is also inapplicable.

CONCLUSION

BMWED's arguments regarding labor protective conditions are without merit and should be rejected. MRS respectfully requests that the Board grant the exemption petition without imposing any labor protective conditions.

Respectfully submitted,



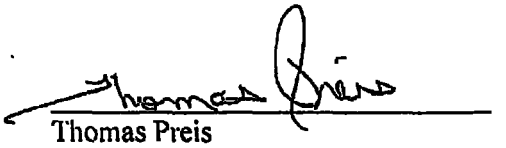
Paul A. Cunningham
Matthew W. Ludwig
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, DC 20006-3804
(202) 973-7600
Attorneys for Manufacturers Railway Company

April 21, 2011

VERIFICATION

I, Thomas Preis, verify under penalty of perjury that the factual assertions in the foregoing Reply To The Brotherhood Of Maintenance Of Way Employees Division – International Brotherhood Of Teamsters' Opposition To Petition For Exemption are true and correct to the best of my knowledge. I also verify that I am qualified and authorized to file this Reply.

Executed on April 20, 2011



Thomas Preis
Director of Transportation Procurement
Anheuser-Busch, Inc.

VERIFICATION

I, Kurt Andrew, verify under penalty of perjury that the factual assertions in the foregoing Reply To The Brotherhood Of Maintenance Of Way Employees Division – International Brotherhood Of Teamsters' Opposition To Petition For Exemption are true and correct to the best of my knowledge. I also verify that I am qualified and authorized to file this Reply.

Executed on April 20, 2011

Kurt Andrew
President & CEO
Manufacturers Railway Company

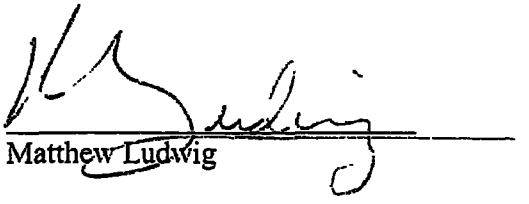
CERTIFICATE OF SERVICE

I certify that I have this 21st day of April, 2011, served copies of the foregoing Reply To The Brotherhood Of Maintenance Of Way Employees Division – International Brotherhood Of Teamsters' Opposition To Petition For Exemption upon the following parties of record in this proceeding by first-class mail or a more expeditious method.

Erika A. Diehl
United Transportation Union
24950 Country Club Blvd., Suite 340
North Olmsted, OH 44070-5333

Donald F. Griffin
BMWED-IBT
1727 King Street, Suite 210
Alexandria, VA 22314

Michael S. Wolly
ZWERDLING PAUL LEIBIG KAHN & WOLLY
1025 Connecticut Ave NW, Suite 712
Washington, DC 20036



Matthew Ludwig